(2)

No. 96-1219

Supreme Court, U.S.
FILED
FEB 25 1997
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

MICHIGAN DOCUMENT SERVICES, INC.,
AND JAMES M. SMITH,
Petitioners,

v.

PRINCETON UNIVERSITY PRESS, MACMILLAN,
INC., AND ST. MARTIN'S PRESS, INC.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Michael J. Bowers, Attorney General
State of Georgia
Michael E. Hobbs, Counsel
to the Attorney General
40 Capitol Sq. SW
Atlanta, Georgia 30334-1300
(404) 656-2218

L. Ray Patterson, Special
Assistant Attorney General
Counsel of Record
School of Law
University of Georgia
Athens, Georgia 30602-6012
(706) 542-5145

35 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 1

Argument 4

I. This Court Has Not Settled, but Now Should Settle, the Question of Whether, Despite the Educational Fair Use Provisions of the Copyright Act, Publishers are Entitled to Impose Upon Students a Pay-Per-Use Fee for the Classroom Use of Excerpts from Copyrighted Books 4

A. The Importance of the Question 4

B. This Court Should Settle the Question Now 14

C. The Court of Appeals Decision is Detrimental to Copyright Jurisprudence 16

II. The Court of Appeals So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision 18

Conclusion 20

TABLE OF AUTHORITIES

Page

Cases:

American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1995) 15

Baker v. Selden, 101 U.S. 99 (1880) 19

Board of Education v. Pico, 457 U.S. 853 (1982) 11

Bobbs-Merrill v. Straus, 210 U.S. 339 (1908) 19

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) 19

Donaldson v. Beckett, 4 Burr. 2408, 98 Eng. Rep. 257; 2 Bro. P.C. 129, 1 Eng. Rep. 837 (1774) 13

Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 390 (1991) 8, 10, 14, 15, 16, 19

The Gates Rubber Co. v. Bando Chemical Industries, Ltd., 9 F.3d 823 (10th Cir. 1993) 16

Mitek Holdings, Inc. v. Arce Engineering Co., 89 F.3d 1548 (11th Cir. 1996) 16

Page

Motion Picture Patents Co. v. Universal Film Manufacturing Co., 243 U.S. 502 (1917) 6, 19, 20

Publications International, Ltd. v. Meredith Corp., 88 F.3d 473 (7th Cir. 1996) 15

Sega Enterprises, Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1993) 15

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 19

Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834) 13, 19

Constitution:

U.S. Const. art. I, § 8, cl. 8 . . . . . 10, 13

Statutes:

17 U.S.C. § 101 8

17 U.S.C. § 102 . . . . . 8, 10, 14

17 U.S.C. § 103 . . . . . 8, 9

17 U.S.C. § 107 . . . . . 4, 5, 15, 17, 18

Page

Other References:

The First English Copyright Statute:
Statute of Anne, 8 Anne, c. 19 . . . . . 12, 13

L. Ray Patterson, *Copyright in Historical Perspective*, (1968) 12

Craig Joyce, *The Rise of the Supreme Court Reporter, An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291 (1985) 13

L. Ray Patterson, *Copyright and "the exclusive Right" of Authors*, 1 J. of Intell. Prop. Law 1 (1993) 8

Kristina Rosette, *Back to the Future: How Federal Courts Create a Federal Common-law Copyright Through Permanent Injunctions Protecting Future Works*, 2 J. of Intell. Prop. Law 325 (1994) 17

Association of American Publishers Compliance Letter to Copyshop, 1 J. of Intell. Prop. 411-417 (1993) 9

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae, the Attorney General of the State of Georgia, is the chief legal officer of the State and is concerned with the law as it affects the people of Georgia. When the Attorney General believes that federal law is administered contrary to federal statutes and to the detriment of Georgia citizens, he has a duty to take appropriate action on behalf of Georgia's residents.

The Attorney General firmly believes that in this case the United States Court of Appeals for the Sixth Circuit misconstrued the United States copyright statute in a way that will have a harmful effect on education in Georgia. To give publishers a dominant role in determining the materials to be used in the classroom, as the Sixth Circuit does, will interfere with the academic freedom of Georgia professors to choose teaching materials best suited to their educational goals and places at risk the quality of classroom instruction for Georgia students. Because publishers are entrepreneurs interested in profit rather than teaching, the presumption is that they always will sacrifice quality in education in favor of money. Their rationalization is that copyright is their private property unhampered with any public interest, which is manifestly not so.

For these reasons, the Attorney General of the State of Georgia submits this brief as *amicus curiae* to aid this Court in determining whether to hear this case.

SUMMARY OF ARGUMENT

The Court of Appeals' *en banc* decision, contrary to the plain meaning of section 107 of the Copyright Act,

substitutes the publishers' practice of pay-per-use for the educators' right of fair use.[1] Pay-per-use means a license fee multiplied by the number of students in a class to be paid to the one-time publisher of a book each time an excerpt from that book is used for teaching purposes. If it stands, the Court of Appeals' decision will mean that no teacher can copy an excerpt from a copyrighted book and distribute it to the members of a class for the term of copyright--life of the author plus fifty years, or three generations or more--without the consent of the publisher. The result will be pay-per-use or no use.

The pay-per-use practice will change the American educational system by giving publishers the power of veto over the teacher's choice of teaching materials and placing an additional financial burden on traditionally impecunious students. Since publishers are entrepreneurs interested in money, not teaching, the change will be harmful for the student and undesirable for the teacher.

The Court of Appeals in making its ruling unwittingly sacrificed intellectual integrity in favor of several faulty premises: 1) that all copyrighted works are entitled to the same measure of protection, although Congress has varied the scope of copyright protection according to the amount of uncopyrightable material a work may contain; 2) that a court may grant a permanent injunction to protect future works for which copyrights are not in existence, although Congress has provided copyright only for original works of authorship fixed in a tangible medium of expression; 3) that the Second Circuit's rule that

---

[1]The Court of Appeals' decision is reprinted in Appendix A ("App. A") of the Petition for Writ of Certiorari.

copying is *per se* infringement--contrary to the rule in other circuits--is the preferable rule, although Congress specifically provided that the right of fair use includes copying; and 4) that the Copyright Act gives a copyright owner the right to sell books and then to collect license fees for classroom use, although the statute gives the copyright owner the right to distribute to the public by sale or by lease, but not both.

The legacy of the decision, if it survives, will be these faulty premises, judicial rules by reason of which courts unknowingly will grant unconstitutional copyright protection in the manner of the unconstitutional sweat-of-the brow cases. Courts thus will feel free to disregard the constitutional limits that bind Congress and so defeat copyright policies mandated by the Constitution's Copyright Clause: 1) the promotion of learning (because the clause so states); 2) the protection of the public domain (because copyright is limited to original writings for limited times); and 3) the publication of works (because the exclusive right is the right to publish). The first policy means that copyright cannot be used to censor the copying of excerpts from published books (which is contrary to learning), the second that public domain material cannot be protected by copyright (which is desirable for learning), the third that the author has the exclusive right to publish his or her work (which is necessary for learning). These policies bind Congress in the enactment of copyright statutes and they should bind courts in the interpretation of those statutes.

The essential problem is the line of demarcation between the appropriate proprietary rights of copyright owners and the First Amendment right of access of individual users. This Court has historically been willing to police the location of that line, which the Court of Appeals

displaced in approving the pay-per-use practice. Since no one has yet satisfactorily explained why a publisher, as the manufacturer (not author) of books should be able to sell the books and then charge students for each use of them (for three generations or more), this Court should fulfill its traditional policing role to protect the public interest and hear this case in order to correct the imbalance that the Court of Appeals' decision has created.

ARGUMENT

I. This Court Has Not Settled, but Now Should Settle, the Question of Whether, Despite the Educational Fair Use Provisions of the Copyright Act, Publishers are Entitled to Impose Upon Students a Pay-Per-Use Fee for the Classroom Use of Excerpts from Copyrighted Books.

A. The Importance of the Question.

Rarely has a Court of Appeals' decision had the potential for changing the landscape of American education as does the Sixth Circuit opinion in this case. An *en banc* decision reversing the panel decision by an eight to five vote, the case empowers publishers to impose on students fees for the classroom use of excerpts from copyrighted materials chosen by the professor.

A professor's preparation of teaching materials tailored to a particular course (for which a published text is unavailable or to supplement published texts) is a fair use of long standing that is expressly codified in 17 U.S.C. § 107 ("multiple copies for classroom use" is an exemplar of fair use). The Court of Appeals' *en banc* decision ends the

custom in the Sixth Circuit and will serve as precedent for ending it nationwide.

If the case stands, the result will be to replace fair use with pay-per-use and publishers will require a captive (and changing) market of approximately 14,000,000 college students to pay them *for each use* of copyrighted materials for the classroom.[2] The irony here is that the court directed its ruling to the printer, ignoring the professors who ordered, and the students who benefitted from, the printing. Thus, the Court of Appeals relied on the fact that a copyshop printed the copies, although the students' professors chose and copied the material to be reproduced and used the copyshop only as a matter of convenience for both themselves and their students.[3]

The publishers' motive in seeking to substitute pay-per-use for educational fair use is made transparent by the meaning of pay-per-use in this context: Payment multiplied by the number of students in a class each term the same

---

[2]The Court of Appeals apparently did not appreciate this point. Said the court: "What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits--and give itself a competitive edge over other copyshops--by declining to pay the royalties *requested by the holders of the copyrights*." App. A at 8a (emphasis added). But the students, not the copyshops, pay the royalties. Any "competitive edge" results from Petitioners' refusal to comply with the publishers' "requests" to collect, and pay them, illegal license fees from students.

[3]The court did not decide whether "it would be fair use for the students or professors to make their own copies," but said that the point "is by no means free from doubt." App. A at 16a. The court did not explain why Congress should use the phrase "multiple copies for classroom use" as an exemplar of fair use, 17 U.S.C. § 107, if the constituents of the classroom cannot make the copies without infringing the copyright.

material is used.[4] In view of the term of copyright--life of the author plus fifty years, or three generations or more--the children and grandchildren of today's students may well be compelled to pay fees for using the same material as their forebears. "The [copyright] law furnishes no warrant for such a practice and the cost, inconvenience and annoyance to the public which the opposite conclusion would occasion forbid it." *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 516 (1917). Profiteering is not an inappropriate term to apply to the practice of "requesting" and collecting from three generations of students (and all in between) fees for the classroom use of excerpts from books that have been placed on the library shelf. The core question, whether courts can empower publishers to use copyright for this type of continuing control as a reward for the one-time publication of a book, is an important question of federal law that only this Court can answer.

The Court of Appeals' *en banc* opinion, with three strong dissents, clearly intends to establish legal precedent for the pay-per-use practice. "Congress has *implicitly suggested* that licensing fees should be recognized in appropriate cases as part of the potential market for or value of the copyright work, . . ." App. A. at 12a-13a (emphasis added). The court emphasized that "[t]he potential uses of the copyrighted works at issue . . . clearly include the

---

[4]Pay-per-use calls to mind Thomas Macaulay's description of copyright as "a [sales] tax on readers for the purpose of giving a bounty to writers." 56 Parl. Deb. (3d Ser.) 341, 350 (1841) (debate on lengthening the term of copyright). In addition to the sales tax paid on the purchase of a book, publishers now seek to impose a use tax each time a book they have sold is used. Thus the "Copyright Notice" on coursepacks includes the following statement: "Any attempt to duplicate this material [in the coursepack] without obtaining the appropriate authorization is prohibited."

selling of permission to reproduce portions of the works for inclusion in coursepacks--and the likelihood that publishers actually will license such reproduction is a demonstrated fact." App. A at 13a.

The court thus decided the case on the basis of inferences as to what Congress desired, not the provisions of the statute that Congress enacted. And, of course, the inferences are contrary to the Copyright Clause because they treat publishers, not authors, as the primary and thus constitutional beneficiaries of copyright. Indeed, the court stressed that "licensing income is significant to the publishers. It is the publishers who hold the copyrights, of course--and the publishers obviously need economic incentives to publish scholarly works, even if the scholars do not need direct economic incentives to write such works."[5] App. A at 22a.

The court's reasoning thus subordinates the public interest in learning to the publishers' interest in money, and because it does, the decision will change the entire landscape of education in this country, public and private, grade school and high school, college and university. A change so important to the administration of hundreds of thousands of copyrights--which affects every U.S. citizen in every aspect of their lives, cultural, economic, educational and political--

---

[5]The captive market for "scholarly works," some 14,000,000 college and university students, which changes by approximately 25% every year as graduating classes are replaced by entering classes, explains why the traditional copyright monopoly provides sufficient incentive for publishers to publish and also why they want to extend the monopoly in order to collect license fees from students for the classroom use of excerpts from books they already have sold.

should be made by Congress, not courts, and only this Court can prevent lower courts from making the change.

Moreover, the Court of Appeals' opinion raises three related and fundamental issues of copyright law -- whether in an infringement action a court may disregard the fact that copyrighted works contain varying amounts of material protected by copyright and treat all copyrighted works the same;[6] whether a federal court can grant a permanent injunction to protect non-existent copyrights for future works not yet created;[7] and whether fair use is necessary to make the 1976 Copyright Act constitutional in view of the expansion of the copyright monopoly beyond the exclusive right to publish works, which arguably is the limit of Congress' power in the Copyright Clause and under the First Amendment.[8] These are "questions whose resolution

---

[6]Congress has provided copyright for compilations and derivative works, both of which contain material that is not original with the compilation or derivative author and thus not entitled to protection. 17 U.S.C. § 103; 17 U.S.C. § 101 (definitions of compilations and derivative works); *Feist Publications v. Rural Telephone Co.*, 499 U.S. 390 (1991).

[7]Copyright subsists only in original works of authorship fixed in a tangible medium of expression. 17 U.S.C. § 102(a).

[8]History provides abundant evidence that "the exclusive Right" in the Copyright Clause is the right to publish. Until the 1976 Copyright Act, for example, publication was a condition for copyright in every copyright statute in this country with one minor exception for certain kinds of works in section 9 of the 1909 Act. Generally, however, under the 1909 Act, copyright was secured by publication with notice. 17 U.S.C. § 10 (1909 Act). The danger of copyright without publication is that the copyright statute may become a law regulating the press, which is why the fair use doctrine is so important. *See* L. Ray Patterson, *Copyright and "the exclusive Right" of Authors*, 1 J. of Intell. Prop. Law 1 (1993) for a discussion of this point.

will have immediate importance far beyond the particular facts and the parties involved . . . ."[9]

The impact of the Court of Appeals' *en banc* opinion, if it stands, will be unprecedented since it is the first time in American history that an appellate court has rejected educational fair use and ruled that publishers can control what excerpts from books in the library teachers may use in the classroom. The effect will be to destroy the line of demarcation between the publishers' appropriate proprietary rights and the students' right of access to copyrighted material that the educational fair use doctrine is intended to protect.

The resulting imbalance will, of course, enable publishers to achieve their goal of creating a licensing system to collect fees from students for the use of learning materials in the classroom solely because the materials are in copyrighted books--even if the materials themselves are in the public domain and not protected by the copyright.[10] Moreover, the right to charge the fee entails the right to forego the fee and deny the right to copy. Indeed, the court noted that one of the plaintiff publishers "would have turned

---

[9]Address of Chief Justice Vinson before American Bar Association, September 7, 1949, 69 S. Ct. v, vi.

[10]*See, e.g.*, copyright compliance letter of March 1, 1993, from the Association of American Publishers to a copyshop claiming the right to be paid royalties because the copyshop copied for classroom use 18th and 19th century British plays (Richard Steel's "The Conscious Lover," George Lillo's "The London Merchant" and Boucicault's "Octoroon"), all in the public domain and none of which ever had copyright protection in the United States. The copyright on the volume in which the plays were contained was a compilation copyright that did not protect the plays. 17 U.S.C. § 103. The letter is reprinted at 1 *J. of Intell. Prop.* 44-47 (1993).

down a request for permission to copy the 45-page excerpt included in a coursepack . . ." App. A at 14a-15a.

The Court of Appeals' decision should be recognized for what it does--transform copyright into an imprimatur to accommodate the publishers' pay-per-use practice. Thus, it raises important issues as to the court's jurisdiction under the Copyright Clause and the First Amendment to grant official approval for the publishers' control of the teachers' classroom use of books that schools have purchased, paid for and placed on the library shelf.

The Court of Appeals' grant to publishers of the power to prevent the use of books for teaching purposes with a specious claim for post-sale royalties raises a critical issue that goes far beyond the facts in this case: Do federal courts have the power to interpret the Copyright Act to achieve results forbidden to Congress because of the limitations in the Copyright Clause.[11] Congress, for example, can grant copyright only for extant writings, U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. § 102(a), but the Court of Appeals approved the district court's use of its inherent injunctive power to extend copyright protection to works not yet created. As Judge Merritt noted in dissent, "The injunction upheld by the Court, as it stands now, extends the rights of the copyright owners far beyond the limits

---

[11]The most famous example of this type of unconstitutional decision was the lower federal courts' use of the sweat-of-the-brow doctrine over a period of approximately seventy years to provide copyright protection for the white pages of telephone directories. Congress never provided such protection in the copyright statute and could not have constitutionally done so. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

prescribed by Congress." App. A at 36a-37a. And, it should be added, the Copyright Clause of the U.S. Constitution.

The Copyright Clause is important for the policies it contains--the promotion of learning (because the clause so states), the protection of the public domain (because copyright is limited to original writings for limited times) and the publication of works (because the exclusive right is the right to publish).[12] The first policy means that copyright cannot be used to censor the copying of excerpts from published books (which is contrary to learning), the second that public domain material cannot be protected by copyright (which is desirable for learning), the third that the author has the exclusive right to publish his or her work (which provides public access for learning).

These policies provide free speech protections that are congruent with--and indeed necessary under--the First Amendment. The constitutional rights to print and speak would be greatly devalued if the printer and speaker could use copyright to control the right of others to read and to hear. *Board of Educ. v. Pico*, 457 U.S. 853 (1982). But this is the effect of the Court of Appeals' decision because it empowers publishers to impose student pay-per-use fees for the use of learning materials in the classroom. Since the statutory language proves that Congress codified the fair use doctrine to avoid this result, a court that substitutes pay-per-use for educational fair use corrupts the statute. Moreover, in granting a permanent injunction to apply its ruling to future works, the court usurped Congress' power by creating a judicial copyright contrary to the U.S. Constitution.

---

[12]*See* note 7, *supra*.

The risk to free speech that the judicial destruction of fair use creates is seen in the Star Chamber's use of copyright--in addition to the official imprimatur--in the Star Chamber Decrees of 1586 and 1637 to deny access to "seditious, heretical, and schismatical" material. *See* Lyman Ray Patterson, *Copyright in Historical Perspective*, Ch. 6, "Copyright and Censorship" (1968). This history explains why, after the end of censorship in Elizabethan and Jacobean England, the English made the successor to the publishers' trade copyright,[13] the author's statutory copyright created in 1710 by the first English copyright act, the Statute of Anne, 8 Anne, c. 19, available only for printed books and limited copyright to the right to publish a book.[14] The design of the statute, in short, was to prevent publishers from using the statutory copyright as a substitute for the licenser's imprimatur to gain a profit as the licensers had used its predecessor to prevent the publication of undesirable books.

This English history is relevant to American copyright law today because the framers of the Constitution adopted the anti-censorship, limited-monopoly copyright

---

[13]The trade copyright was called the stationers' copyright, named for the Stationers' Company, the London Company of the booktrade, that developed it to serve company members (printers, bookbinders and booksellers, but not authors) after William Caxton introduced the printing press into England in the 1470's.

[14]The right granted to the author as initial owner was the "sole liberty of printing and reprinting [books] for the term of fourteen years, to commence from the first day of publishing the same, and no longer." 8 Anne, c. 19, Sec. I. The author, of course, could assign "the sole liberty," *i.e.* copyright.

policies of England in full, as both the First Amendment[15] and the Copyright Clause demonstrate. That the adoption of the English policies was purposeful is shown by the fact that the framers used the title of the Statute of Anne as the source for the language of the Copyright Clause.[16] Apparently, this is the only provision of the U.S. Constitution for which the source can be precisely identified and thus the only provision for which there is a pre-1789 annotation, the English statute itself and its definitive interpretation by the House of Lords in 1774.[17] The important point, however, is that Congress was bound by

---

[15]It is, of course, no accident that the First Amendment protects the freedom of religion as well as speech and the press since it was religious strife, precipitated by Henry VIII's break with the Roman Catholic Church in the 1530's, that led to the government's policies of censorship and press control in England.

[16]The title reads: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." 8 Anne, c. 19 (1710). *Cf.* "Congress shall have Power: . . . To promote the Progress of Science . . . by securing for Limited Times to Authors . . . the exclusive Right to their . . . Writings." U.S. Const. art. I, § 8, cl. 8. (Since the Intellectual Property Clause includes the patent as well as the copyright clause, it should be read distributively.)

[17]The Statute of Anne was the model for the U.S. Copyright Act of 1790, 1 Stat. 124, but the most valuable annotation may be the 1774 House of Lords' decision that gave the Statute of Anne its definitive interpretation, holding that copyright is a limited statutory grant, not a natural law property right. *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng.Rep. 257; 2 Bro. P.C. 129, 1 Eng. Rep. 837 (1774); 17 Cobbett's Parl. Hist. 953 (1813). This Court adopted that holding in its first copyright case, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the bedrock case of American copyright law. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*," 83 Mich. L. Rev. 1291 (1985).

constitutional policies when enacting the Copyright Act and courts are bound by them when interpreting it.

B. This Court Should Settle the Question Now.

A Court of Appeals' *en banc* decision validating the publishers' claim that the copyright law gives them the right to impose a pay-per-use license fee on students for the use of teaching materials in the classroom should be considered by this Court without delay. Publishers, of course, are copyright owners only as assignees of authors, 17 U.S.C. § 201(a)(d), or under the work-for-hire fiction. 17 U.S.C. § 201(b). Thus, no one yet has satisfactorily explained why the publishers' *quid pro quo* for the one time publication of a book should include not only the sale price, but also the right to require three generations or more of students to pay a license fee for each classroom use of a book that entails copying.

The Court of Appeals did not even require the publishers to prove that the contents of the books in issue were original, a constitutional condition of copyright. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). Indeed, in holding that "[petitioners'] commercial exploitation of the copyrighted materials [by copying] did not constitute fair use," App. A at 2a, the Court of Appeals adopted a *per se* rule that copyright protects everything in a copyrighted work (regardless of originality). The fact that a commercial copier did the copying in this case should not be allowed to obscure the rule the court applied: *that any copying is infringement*.[18]

---

[18]This, of course, is the position of the publishers. See, for example, the copyright notice of the *Association of American Publishers 1994 Industry Statistics*, which reads in full as follows:

The Sixth Circuit thus joined the Second Circuit in adopting, contrary to the language of 17 U.S.C. § 107, a *per se* copying rule. *See American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 937 (2d Cir. 1995) (Judge Jacobs, dissenting, made the point: "The majority holds that photocopying journal articles without a license is an infringement"). Such a rule, of course, makes the content of the copyrighted work--and thus the constitutional requirement of originality--irrelevant.

In contrast to the rule of the Sixth and Second Circuits that makes copying *per se* infringement regardless of content, the rule in the Seventh, Ninth, Tenth and Eleventh Circuits--consistent with 17 U.S.C. § 107--is that copying may be fair use, and indeed, consistent with this Court's holding in *Feist* that a copyright holder must prove the taking of original material to succeed in an infringement action. *See Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473, 481 (7th Cir. 1996) (recipes not original; cases cited by plaintiff do not "support a *per se* rule" that recipes are protected by copyright); *Sega Enterprises, Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1993)

© 1995 by Association of American Publishers, Inc. All Rights Reserved. No part of this report may be used or reproduced in any manner whatsoever without express permission from the Association of American Publishers, Inc., 71 Fifth Avenue, New York, NY 10003-3004

Notices of this kind exemplify the drive on the part of publishers to override the statutory and constitutional limits of copyright and to control the use of all works regardless of content despite this Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) and its holding that there is a constitutional right to use uncopyrightable material in a copyrighted work.

("where disassembly is the only way to gain access to the ideas . . . embodied in a copyrighted computer program . . . disassembly is a fair use of the copyrighted work, as a matter of law"); *The Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 833 (10th Cir. 1993) (plaintiff must prove that "protected elements of a copyrighted work are copied"); *Mitek Holdings, Inc. v. Arce Engineering Co.*, 89 F.3d 1548, 1553 (11th Cir. 1996) (quoting *Feist* rule requiring proof of the taking of original components of a copyrighted work).

The Court of Appeals' fault in this case was that it preferred the publishers' private interest in making money for publishing a book regardless of content over the public interest in the fair use of the book, the measure of which is to be determined in part by the book's content. The effect of the error is immediate and, if not immediately corrected, will quickly become lasting. The money to be made from a changing and captive market of some fourteen million students (who have no choice as to the teaching materials their professors assign) will unjustly enrich both publishers and their lawyers. The problem of delay is that judicial approval of a practice as profitable as pay-per-use will rapidly become entrenched and will be jealously guarded with the profits the practice produces.

C. The Court of Appeals' Decision is Detrimental to Copyright Jurisprudence.

The Court of Appeals' *en banc* decision used the only logical tool available for empowering publishers to impose pay-per-use fees on students in the classroom, faulty premises. In addition to the primary premise that copying is

per se infringement,[19] discussed above, a second premise is that the Copyright Act gives a copyright owner the right to sell books and then to receive license fees for their use.[20] A third faulty premise is that all copyrighted books are entitled to the same measure of protection, even though some of these books may contain uncopyrightable material;[21] and a fourth is that a federal court has the power to protect extant works after the copyright has expired and future works not yet created for which copyrights do not exist.

To the Petitioners' argument that the district court exceeded its powers by enjoining them from reproduction of future copyrighted works, the Court of Appeals said, "[w]e do not find the argument persuasive. The weight of authority supports the extension of injunctive relief to future works." App. A at 25a-26a. This "weight of authority"--in the tradition of the sweat-of-the-brow cases that gave unconstitutional copyright protection for names, addresses and telephone numbers--creates unconstitutional federal common law copyrights.[22] The disadvantage of gratuitously created federal common law copyrights is that they are perpetual and not subject to statutory limitations, for example, fair use, or constitutional conditions, for example,

---

[19]This cannot be so in light of the fact that the statute expressly permits fair use copying. 17 U.S.C. § 107.

[20]Section 106(3) gives the copyright owner the right to sell or to lease the copyrighted work, but not to sell the work and then lease its use by imposing copying fees.

[21]*See* note 5.

[22]*See* Kristina Rosette, *Back to the Future: How Federal Courts Create a Federal Common-law Copyright Through Permanent Injunctions Protecting Future Works*, 2 J. of Intell. Prop. Law 325 (1994).

originality. Thus, the judicial copyrights created by injunction protect works without regard to content or term, although the Constitution expressly limits statutory copyright to original works for a limited time.

The harm of the Court of Appeals' decision is as much in its faulty premises as in its holding. The holding will influence other courts in cases involving other copyshops; and, the premises (being in an *en banc* decision) will have a major impact on copyright jurisprudence. Unless this Court acts to correct them, the Court of Appeals' faulty premises will become unconstitutional rules that will empower courts to grant copyright protection far beyond the constitutional limits that bind Congress.

II. The Court of Appeals So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

A copyshop that reproduces teaching materials for professors does not infringe any copyright. The fair use statute provides:

> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 17 U.S.C. § 107.

This language is so clear that "[i]t would serve no good purpose to amplify by argument or illustration this

plain meaning of the statute. It is so plain that to argue it would obscure it." *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. at 513.

Because it ignored this plain language and judicially expanded the copyright monopoly beyond the statutory limits set by Congress acting under its constitutional authority, the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The magnitude of the Court of Appeals' departure becomes apparent when this case is considered in the context of this Court's decisions to keep copyright within its statutory and constitutional boundaries, beginning with its first copyright decision, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). In *Wheaton*, this Court held that copyright is a limited statutory grant created by Congress, not a common law right created by courts; in *Baker v. Selden*, 101 U.S. 99 (1880), this Court rejected the claim of the copyright owner that copyright protects ideas; in *Bobbs-Merrill v. Straus*, 210 U.S. 339 (1908), this Court rejected the claim of publishers that copyright entitles them to control the retail price of books; in *Sony Corp .of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), this Court recognized a right of personal use by holding that the copying of copyrighted motion pictures off-the-air for later viewing is a fair use; in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 390 (1991), this Court denied the copyright owners' claim of copyright for sweat-of-the-brow works and held that there is a constitutional right to use uncopyrightable material in copyrighted works; and in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), this Court held that the creative use of a work to make a parody can be a fair use.

These cases taken together are part of a consistent and coherent pattern demonstrating the willingness of this Court to police the line of demarcation between the publishers' appropriate proprietary rights on the one hand and the public's right of access on the other. This case presents that problem in acute form--the publishers' pay-per-use practice threatens the very essence of the American educational system--academic freedom for teachers and untaxed access to learning materials for students. For these foundational principles, the Court of Appeals substitutes the principle of profit for publishers. But the public interest "is more a favorite of the law than is the promotion of private fortunes," *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. at 519, and this Court should hear this case to determine if it should act to protect the public interest.

CONCLUSION

For each and all of the above reasons, *amicus curiae*, the Attorney General of the State of Georgia, respectfully urges this Court to grant certiorari to hear this case.

Respectfully submitted,

L. Ray Patterson, Special Assistant
Attorney General, State of Georgia
School of Law
University of Georgia
Athens, GA 30602-6012
(706) 542-5145

Dated: February 19, 1997